F. M. S. REPORTS.

[ORIGINAL CIVIL JURISDICTION]
HOWES, J.
May 28, 1934.
[PERAK CIVIL SUIT No. 705 of 1932]

M. KARUPPAN NADAR.....Plaintiff.

v.

U. SUNDRAM
A. RAMASAMY.....Defendants.

The Civil Procedure Code, 1918, section 98 —Order of Registrar for issue of fresh summons — Ultra Vires — *Rule Committee (Supreme Court) Enactment, 1933, Rule 1, Sub-rule 44— Dismissal of suit.*

An order by the Registrar for the issue of a fresh summons under sub-section (i), section 98 of the Civil Procedure Code, 1918, is *ultra vires* because it is not an act which can ordinarily be performed by the Registrar, as defined in sub-rule 44, Rule I of the rules made under the Rule Committee (Supreme Court) Enactment, 1930.

But, where such an order has been made by the Registrar, it is within the power of the Court to ignore it and make an order under sub-section (i) of section 98 dismissing the suit.

H. Y. Teh for the plaintiff.

J. Dunford Wood for the second defendant.

HOWES, J.—This was an application by the the second defendant under section 98 (i) or section 612 of the Civil Procedure Code that the suit be dismissed.

The original plaint was issued under Chapter XXXIX of the Civil Procedure Code on the 16th December, 1932, and was founded on a promissory note for $1,240/- dated the 13th February, 1930.

On the 16th day of December, 1932, the plaintiff filed an application asking for substituted service by registered post, but the order for substituted service was never made, as the plaintiff never pursued the application.

On the 14th March, 1934, the plaintiff applied for an order that a fresh summons should be served on the second defendant, the first defendant then being dead. Notice of the application was not given to the second defendant, though his address was known to the plaintiff at the time.

In his affidavit in support, the plaintiff did not disclose the fact that he had previously applied for substituted service and his statement in para 3 thereof was inconsistent with that in his affidavit of 16th December, 1932 (in which he applied for substituted service), and wherein the full postal addresses of the defendants were given. The statement that the defendants had gone to India "for the purpose of avoiding their creditors" was therefore unsupported.

On the 14th March, 1934, the Registrar ordered that a fresh summons should be served on the second defendant.

Instead of appealing against this order, the second defendant now applies for the suit to be dismissed.

The plaintiff took no steps to serve the original summons, which lay dormant for over a year before the issue of a new summons was applied for.

For the plaintiff, it was argued that the motion cannot be brought under section 98 (i), and that when the Registrar has ordered a new summons to issue the Court cannot entertain a motion for dismissal of the suit under section 98 (i). The proper course, it was argued, was for the defendant to appeal from the Registrar's order under section 7 (iii) of the Courts Enactment as amended by Enactment 18 of 1932. Or, the Registrar could have been asked to amend his order under section 7 (ii) (c). As against this, the second defendant was not aware of the application for the summons, and by the time it was served on him it was too late for him to appeal from the Registrar's order.

The power to issue a fresh summons, in cases where a summons has been returned unserved, arises under section 98 (i) which is contained in Chapter IX of the Civil Procedure Code. Rule I, sub-rule 44, (1932 Enactment page 512) defines the acts which shall ordinarily be performed by the Registrar and the rule does not include procedure under Chapter IX of the Civil Procedure Code.

I hold that the order for the issue of a new summons made by the Registrar under section 98 (i) was *ultra vires* and consequently bad. Moreover, from the affidavits it is clear that the Registrar was wrongly informed of the facts of the case by the plaintiff, and the previous application for substituted service was suppressed.

In the circumstances, I hold that it is within the power of the Court to act under section 98 (i) of the Civil Procedure Code and to ignore the *ultra vires* order of the Registrar of the 14th March, 1934, and I accordingly order that the suit be dismissed with costs. Liberty to the plaintiff to bring a fresh suit, subject to sub-section (ii) of section 98.